Moreover, these petitioners engaged not merely in "calculated falsehood," but also in premeditated character assassination, such as no one other than they would have the temerity to urge did not constitute "actual malice."

CONCLUSION

This petition is a perversion of the *New York Times* doctrine and a subversion of the very rights which are protected by it. It should be denied.

Respectfully submitted,

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Counsel for Respondent.

PAUL MARTINSON,
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IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners,

v.

JOHN HENRY FAULK,

Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

ARGUMENT 1

I. When damages in any libel case aggregate $550,000, and a trial judge can solemnly justify a jury verdict of $3,500,000, freedom of speech itself is at stake 1

When human words can cost so much the courts can become instruments of oppression 1

The threat of huge libel verdicts will mute the voice of the opinionated 3

II. The First Amendment privileges Petitioners' intrinsically political utterances concerning Respondent, who was both an active, elected union official exercising delegated government power and an entertainer whose relationship to them is obligatory in view of his regularly broadcasting over the public airwaves 5

To say that Respondent, an active, elected and high official of the AFTRA union which exercises control over broadcasting throughout the nation as a result of a delegation to it by the NLRA and state law of compulsory powers over the supply of labor is not subject to the "public official" privilege under *New York Times Co.* v. *Sullivan* is to put form over substance and to ignore the pervasive growth in power and benefits of the public sector 7

A union official enjoying delegated governmental powers who is also a regular entertainer in broadcasting, is by virtue of enjoying a government-imposed monopoly of the public airways (to his benefit) peculiarly subject to public criticism within the *New York Times Co.* v. *Sullivan* rationale 9

PAGE

III. The New York courts' misapplication of tests of "actual malice" (old style) to Petitioners' intrinsically political utterances instead of this Court's test of "actual malice" (new style) as laid down in *New York Times Co.* v. *Sullivan* (actual knowledge of falsity or utter recklessness) violates Petitioner's rights of freedom of speech and the press 12

Pejoratives and Prejudice—give a dog a bad name 13

"Deliberate"—a word adding nothing to the case 13

"Falsity"—a misleading word 14

"Blacklisting"—trial of the issue of whether Columbus discovered America 14

"Extreme malice" (Brief, pp. 6-12) as not even tiny malice by *New York Times Co.* v. *Sullivan* standards 15

They did not lie 18

IV. The question of "whether the entire common law right of action for libel should be abolished" is clearly relevant, though the Court need not go so far in view of the political and public nature of this case 18

CONCLUSION 22

INDEX TO CITATIONS

CASES:

Butts v. *Curtis*, 225 F. Supp. 916 (N. D. Ga. 1964), *appeal docketed*, No. 21,491, 5th Cir., Aug., 1964 2

Clark v. *Allen*, 415 Pa. 484, 204 A. 2d 42 (1964) 20

Cowles Magazines & Broadcasting, Inc. v. *Cepeda*, 328 F. 2d 869 (9th Cir.), *cert. denied*, 379 U. S. 844, 85 S. Ct. 51, 13 L. Ed. 2d 50 (1964) 10

PAGE

Dempsey v. *Time, Inc.*, 43 Misc. 2d 754, 252 N. Y. S. 2d 186 (Sup. Ct., N. Y. Co.) *aff'd. without opinion*, 22 App. Div. 2d 854 (1st Dep't. 1964) 10, 19

Garrison v. *La.*, 379 U. S. (1964) 18

Harper v. *National Review, Inc.*, N. Y. L. J. Dec. 23, 1964, p. 11, cols. 2-3 (Sup. Ct., N. Y. Co.); 33 U. S. L. WEEK 2341 19

Henry v. *Pearson*, 158 So. 2d 695 (Miss. 1963), *pet'n. for cert. filed*, 33 U. S. L. WEEK 3017 (U. S. May 15, 1964) (No. 90) 21

New York Times Co. v. *Sullivan*, 376 U. S. 254 (1964) ..... 3, 7, 8, *passim*

Pauling v. *News-Syndicate Co., Inc.*, 355 F. 2d 659 (2d Cir.), *cert. denied*, 33 U. S. L. WEEK 3245 (U. S. Jan. 18, 1965) 7, 21

Reynolds v. *Pegler*, 223 F. 2d 429 (2d Cir.), *cert. denied*, 350 U. S. 846 (1955) 1

Smoot v. *League of Women Voters of Grand Traverse (Mich.)*, 36 F. R. D. 4 (W. D. Mich.); *rev'd.*, N. Y. Times, Jan. 17, 1965, § 4, p. 7, col. 3 (6th Cir. 1964) 20

Spahn v. *Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N. Y. S. 2d 529 (Sup. Ct., N. Y. Co. 1964) 19

UNREPORTED CASES:

Birdsong v. *Curtis Publishing Co.* (N. D. Ala., C. A. 63-545; filed Nov. 1, 1963) 2

Brando v. *Curtis* (Super. Ct., Los Angeles Co., Calif., No. 811263; filed Jan. 4, 1963) 2

Colvard v. *Curtis* (N. D. Ala., C. A. 64-140; filed Feb. 26, 1964) 3

Corabi v. *Curtis* (Ct. of Common Pleas No. 1, Phila. Co., Pa., Dec. Term 1963, No. 1961; filed Jan. 10, 1964) 3

Diapulse Corp. of America v. *Curtis* (S. D. N. Y., 63 Civ. 3205; filed 1963) 2

PAGE

Fignole v. *Curtis* (S. D. N. Y., 63 Civ. 1788; filed June 18, 1963) 2

Goldmark v. *Canwell,* N. Y. Times, Dec. 10, 1964, p. 7, col. 1 (Super. Ct. Seattle, Wash. 1964) 20

Grayson v. *Curtis* (Super Ct., King Co., Wash., No. 612583; filed Dec. 5, 1963) 3

Newberg v. *Curtis* (E. D. Mich., C. A. 25990) 3

Pearson v. *Fairbanks Pub. Co.* (Sup. Ct., Alaska, 4th Jud. Dist., Nov. 23, 1964) 20

Rosenblatt v. *Baer,* 203 A. 2d 773 (N. H. 1964), *pet'n. for cert. filed,* 33 U. S. L. WEEK 3235 (U. S. Dec. 23, 1964) (No. 780) 21

Schneph v. *N. Y. Times* (Sup. Ct., Bronx Co., Nov. 23, 1964) 19

Silver v. *Curtis* (Super. Ct., Los Angeles Co., Calif. No. 816068; filed Mar. 29, 1963) 2

STATUTES AND CONSTITUTIONAL PROVISIONS:

National Labor Relations Act, §§ 8(a)(3), 9(a), 29 U. S. C. §§ 158(a)(3), 159(a) 6, 7, 9

United States Constitution, Amendment 1 ..... 1, 4, 5, 8, *passim*

United States Constitution, Amendment 13 4

MISCELLANEOUS:

Faulk, "Fear on Trial," New York, 1964 13

Friendly, J. (2d Cir.), Speech excerpt, N. Y. Times, Jan. 31, 1965, p. 43, col. 3 20

Note, *Supreme Court, 1963 Term,* 78 HARV. L. REV. 143, 204 (1964) 21

I NEW STANDARD ENCYCLOPEDIA, A-222, Chicago, 1962 6

Advertisement, Simon and Schuster, "the discovery of an American hero," N. Y. Times, Jan. 26, 1965, p. 35, cols. 6-8 13

PAGE

House Comm. on Un-American Activities, *Guide to Subversive Organizations and Publications*, H. R. Doc. No. 137, 82d Cong., 1st Sess. (1951) 16

Precis of case, *Aware, Inc.* v. *Faulk*, 33 U. S. L. WEEK 3248, Jan. 19, 1965 14

NOTE

Although the Petition in this case was filed on the Appellate Docket, it was originally prepared for filing on the Miscellaneous Docket under Rule 53, being typewritten in accordance with Rule 47 (as explained in motions and affidavit accompanying the Petition). In view of Respondent having printed his opposing Brief, this Reply is also printed, with Petitioners' Counsel, not Petitioners, having contributed the cost of printing.

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AWARE, INC., a corporation, and
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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

When damages in any libel case aggregate $550,000, and a trial judge can solemnly justify a jury verdict of $3,500,000, freedom of speech itself is at stake.

When human words can cost so much the courts can become instruments of oppression

Respondent has said nothing about the electrifying effect of this case on the public. Electrifying is used advisedly because for some the effect of this, the father case[1] of

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[1] The grandfather case was *Reynolds* v. *Pegler*, 223 F. 2d 429 (2d Cir.), *cert. denied*, 350 U. S. 846 (1955), in which the $175,001 aggregate award was then and until *New York Times Co.* v. *Sullivan*, by far the largest libel judgment in history. The Alabama Supreme Court may well have had the $3,500,000 judgment entered in this case in July, 1962, in mind, when later that summer it affirmed the *Sullivan* trial court's judgment of $500,000, 273 Ala. 657, 144 So. 2d 25 (1962).

million-dollar libel damages, has been to provide a source of riches and public amusement out of the controversies of others. A common-law remedy used rather occasionally to yield up to $20,000 or $30,000 in damages has now become for the libel bar richly worth a lawyer's wiles.

In addition to the political and public cases described in the Petition (pp. 58-59) as both threatening and burdening free speech, one magazine alone, *The Saturday Evening Post,* which now considers itself a "sophisticated muckraker", is faced with the crushing burden of defending ten "public interest" million-dollar law suits.[2] Some of these law suits are political, some may just be for pub-

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[2] "Public Interest" Libel Suits Pending Against Curtis Publishing Co. (list supplied by counsel for Curtis except for *Butts*)

1. *Butts* v. *Curtis Publishing Company,* 225 F. Supp. 916 (N. D. Ga. 1964), *appeal docketed,* No. 21,491, 5th Cir., Aug., 1964 (plaintiff, former athletic director and former football coach of University of Georgia, a state university, and also former president of American Football Coaches Ass'n, won a verdict of $60,000 compensatory and $3,000,000 punitive damages [latter reduced to $400,000 by trial judge] for magazine article accusing him of giving Georgia's plays to University of Alabama's football coach).

2. *Marlon Brando* v. *Curtis*—Superior Court, Los Angeles County, California, No. 811263; filed January 4, 1963; damages claimed $5,000,000; plaintiff a well known movie actor.

3. *A. Henry Silver* v. *Curtis*—Superior Court, Los Angeles County, California; No. 816068; filed March 29, 1963; damages claimed $1,000,000 punitive; plaintiff a "marriage counselor."

4. *Daniel Fignole* v. *Curtis*—U.S.D.C, Southern District of New York 63 Civ. 1788; filed June 18, 1963; damages claimed $1,000,000 general, $1,000,000 punitive; plaintiff a candidate for office in Haiti.

5. *Colonel T. B. Birdsong, et al.* v. *Curtis*—USDC, Northern District of Alabama, C.A. 63-545; filed November 1, 1963; damages claimed $1,000,000 general, $1,000,000 punitive; amended 10/14/64 to ask $500,000 compensatory, $500,000 punitive; not clear whether this is in addition to original amount claimed; plaintiffs are commanding officer of the state police and 13 state policemen on duty at the University of Mississippi during civil rights fracas of 1962.

6. *Diapulse Corporation of America* v. *Curtis*—USDC, Southern District of New York, 63 Civ. 3205; filed 1963; damages claimed $2,500,000 compensatory, $500,000 punitive; plaintiff producer of a diathermy machine claimed to cure arthritis.

(Continued on following page)

licity, but all involve matters of public concern. All were started after the $3,500,000 jury verdict in this case was confirmed by the trial judge in July, 1962 (35 Misc. 2d 302, 231 N. Y. S. 2d 270) (Petition, Appendix B, pp. 92-105), though before the decision in *New York Times Co. v. Sullivan*. The first of these offspring to reach a verdict, the *Butts* case, n. 2 *supra*, merely reinforces the possibilities of wealth in going after big libel judgments.

Even if these cases can eventually be fought and for the most part kept within bounds, they involve vast expenditures of time and funds by defendants. They clog the courts and distort their processes. They emphasize the deterrence, not the encouragement of free speech.

The threat of huge libel verdicts will mute the voice of the opinionated

Far worse than the burden on courts and mass-publisher defendants, however, is the effect on the politically opinionated. They are almost never persons with vast publishing facilities or the ability to spread the risk by insurance or by treating damages as a tax-deductible cost of doing business.

(Continued from preceding page)

7. *John Grayson* v. *Curtis*—Superior Court of King County, Washington, No. 612583; filed December 5, 1963; damages claimed $300,000; plaintiff a basketball coach.

8. *Lillian Reis Corabi* v. *Curtis*—Court of Common Pleas No. 1, Philadelphia County, December Term 1963, No. 1961; filed January 10, 1964; damages claimed on libel count (there are other counts) "in excess of $10,000 compensatory," $400,000 punitive. Plaintiff a well-known night club entertainer and co-defendant in sensational robbery case. Convicted since article.

9. *Dewey T. Colvard* v. *Curtis*—USDC, Northern District of Alabama, C.A. 64-140; filed February 26, 1964; damages claimed $3,000,000 compensatory and punitive. Plaintiff the Sheriff of Etowah County, Alabama. Article dealt with civil rights demonstrations.

10. *William C. Newberg* v. *Curtis*—USDC, Eastern District of Michigan, C.A. 25990; damages claimed $2,000,000; plaintiff ousted president of Chrysler Corporation.

For them the threat is greater. They can, as Petitioners, lose everything. Judgments against them cannot be washed away in bankruptcy. Their damages stand until they die or flee the country. The oppression is even greater in the political case since in income garnishee proceedings a defendant's political enemy may regularly learn the sources of his income from political sources. Even the XIII Amendment cannot gain him manumission.

Even rich men cannot dependably protect themselves. Predictably, at least one insurance company has risen to the need and offers an umbrella policy of $1,000,000 libel and slander protection for three years for $207.00, though one is unlikely to get it without considerable other insurance coverage. Some large corporations now require their directors to have it. The fallacy is that most directors of large corporations habitually avoid controversy and do not need coverage, and one can surmise that an insured who is sued for speaking out will not be allowed to renew.

The difficulty is even worse for those not in the mainstream of political thinking, whether rich or poor, and on whom a test of relevance, as here, is imposed. One ensconced in the mainstream because it is congenial, profitable, or to him philosophically correct will be able to view the extremes and sense the bounds beyond which he cannot go in political characterization without facing a suit for libel. The threat of huge damages therefore weighs little on him. One who is near an end of the political spectrum, however, may genuinely view all between him and the other extreme as in one lump. Yet if he says so, he may face huge damages in libel. Unless the First Amendment intervenes, political discussion will become sterile, with those on the edges of the extreme currently out of fashion afraid to speak out as they think—worse, only those of that extreme who are less sensitive or aware will speak and dialogue will fall to a lowest common denominator rather than being robust and full.

II.

The First Amendment privileges Petitioners' intrinsically political utterances concerning Respondent, who was both an active, elected union official exercising delegated government power and an entertainer whose relationship to them is obligatory in view of his regularly broadcasting over the public airwaves.

The major theme of Respondent's Brief is that this case involves a purely private libel visited upon him for his union activities, with which Petitioners had no right to be concerned, and that Petitioners had no right to communicate their utterances to his present and prospective broadcasting employers.

What could be more public than utterances concerning issues of communism? Who could be more public than one enabled by a government-fostered broadcasting monopoly to benefit himself by appearing on the public's airwaves? Who should be more subject to criticism than one who wields governmentally granted powers in his capacity as an active, high official of a union controlling the labor supply for national broadcasting?

The utterances had to do with Respondent's suitability to be such a union officer with duties in which the public has an interest. A reading of the whole *News Supplement*, or any part of it (Petition, Appendix A, pp. 61-64), makes this clear. Respondent's attitude towards communism, a public matter, was in issue. Respondent was not accused of something private, such as committing adultery or having a loathsome disease or writing bad checks. He was not even accused of something which might affect his public role of broadcasting on the public airwaves, such as taking payola, habitual lateness or being drunk on a program. The only charge was an inherently political one, with which every member of the public may legitimately be concerned, and a subject concerning which members of the public

should be entitled to communicate about with those enjoying power over them.

To set at rest Respondent's contention that Petitioners are generalizi[ng] *dehors* the record concerning AFTRA and Respondent' powers (Brief, p. 12), the Court need only refer to the complaint, Article Tenth (Petition, Appendix B, p. 110): "common knowledge" that Respondent had to comply with "law" (*i.e.,* NLRA) and sign a non-communist affidavit, when he became an AFTRA officer; the opening statement at the trial by counsel for Respondent: "All actors and actresses must belong to an organization called AFTRA"; and similar statements (R. b78 *et seq.*) Even a children's reference work, sold door-to-door, gives similar "common knowledge":

> "AMERICAN FEDERATION OF TELEVISION ARTISTS, a labor union affiliated with the AFL-CIO. Its membership of 12,000 includes most of the professional radio and television performers in the United States. AFTRA sets a minimum pay-scale for all appearances or performances within its jurisdiction. In most cities, a radio or television performer must either be a member of the union or get its special permission to perform. Its headquarters are in New York City." I NEW STANDARD ENCYCLOPEDIA A-222 (Chicago, 1962)

Moreover, Petitioners went into these same points of union power and Respondent's role in the Court of Appeals (Court of Appeals Brief, pp. II—a-m; Reply, pp. 12-20; Brief on Motion for Reargument, pp. 3-5), and Respondent in no way objected to them in his Brief or Affidavit in Opposition there.

To say that Respondent, an active, elected and high official of the AFTRA union which exercises control over broadcasting throughout the nation as a result of a delegation to it by the NLRA and state law of compulsory powers over the supply of labor is not subject to the "public official" privilege under *New York Times Co.* v. *Sullivan* is to put form over substance and to ignore the pervasive growth in power and benefits of the public sector

Despite his role as the active, elected second vice-president (and thus third highest official) of the New York local board (with jurisdiction over all "live" local and national broadcasting emanating from the Greater New York heart of television and radio in the United States), the major subdivision of AFTRA, enjoying powers of compulsion under Federal and state law, Respondent puts form over substance in denying that he is subject to the *New York Times Co.* v. *Sullivan* rationale.

Respondent was the prime mover in establishing the ticket which put him into high union office, whether he was paid or not. He was responsible for the proper exercise of the powers delegated by government, regardless of whether union employees did the day-to-day work. He was active.

He contends that despite possessing these government-delegated powers, the public has no privilege in criticizing him or inquiring into his suitability for office. His reason is that he had no privilege to criticize members of the public, thus urging that the *New York Times Co.* v. *Sullivan* privilege was based solely on a reciprocity doctrine (Brief, p. 13), citing *Pauling* v. *News-Syndicate Co.*, 355 F. 2d 659 (2d Cir.), *cert. denied*, 33 U. S. L. WEEK 3245 (U. S. Jan. 18, 1965) (Brief, p. 15) for the same argument.

Petitioners submit that *New York Times Co.* v. *Sullivan* protection is based on something more than a reciprocity doctrine permitting citizens to criticize those traditional governmental officials who might criticize them. Any person or "official" wielding government powers is everybody's

property and the right to criticize him should be regardless of whether he is privileged or not; the ordinary citizen is simply not everybody's property. A cat may look at a king.

Petitioners suggest that the true test of the *New York Times Co.* v. *Sullivan* privilege under the First Amendment is the obligatory nature as to every one of the official's powers. It should not be his title, nor exercise of a traditional function of government, nor sovereign immunity, but his powers which govern.

The obligatory right to impose duties on others is the only test which is broad enough to make *New York Times Co.* v. *Sullivan* consistent with the traditional scope of extent of privilege. Earlier notions of privilege were based on sovereign immunity, which Petitioners contend is hardly a suitable test in a democratic society. Such a test would even exclude the municipal corporation of *New York Times Co.* v. *Sullivan.*

The privilege began coterminous with the immunity of the sovereign. Originally the king alone, but later his barons and commons and courts, and eventually his high officers of state came within the privilege since within the immunity. One may suppose that the outer reach of the privilege included the enforcers of the sovereign's peace in his counties. They needed it to govern effectively.

Where does this leave the sovereign's creatures? Until *New York Times Co.* v. *Sullivan,* the official of a town or city enjoying powers under a limited charter was by no means assured of a privilege, except by analogy to the immunity of officers of counties (which were merely subdivisions of the sovereign), because such creatures were not themselves sovereign. Since *New York Times Co.* v. *Sullivan,* whether there is sovereign immunity to justify it or not, the privilege may well extend even to the mayor who is lord over only a road and sewerage system for a thousand souls.

To privilege critics of such an official (however his privilege is justified) yet not to recognize the vast new

delegations of power in this century to other persons and bodies to compel people to do things is to put form over substance.

As pointed out in the petition (pp. 18-23), an NLRA union official exerts great obligatory powers derived from government: he may compel employers to bargain exclusively with him; he may compel persons to join his union; he may tax them for support of the union; he enjoys a monopoly based on government power which permits him to impose duties on others. (This is quite different from the power of an officer of an ordinary private business corporation, which though a creature of the sovereign, lacks this power to impose duties on others.) When the actual powers over broadcasting derived from such an obligatory governmental power base become as great as those which AFTRA's officers can exert over national broadcasting, they should be as subject to public criticism as was Commissioner Sullivan.

Petitioners as members of the public (even disregarding the fact that a quarter of the members of Petitioner Aware were members of AFTRA) should thus be entitled to criticize Respondent under the *New York Times Co.* v. *Sullivan* privilege, just as the *New York Times* itself was permitted to criticize Commissioner Sullivan, though the *Times* was published almost a thousand miles away.

A union official enjoying delegated governmental powers who is also a regular entertainer in broadcasting, is by virtue of enjoying a government-imposed monopoly of the public airways (to his benefit) peculiarly subject to public criticism within the *New York Times Co.* v. *Sullivan* rationale

Respondent makes much of the fact that the industry-wide recipients of the *News Supplement* included "every possible source of employment which respondent could hope for" (Brief, p. 6). (For that matter, it also included every medium for communicating from the outside with AFTRA

members who could vote to re-elect Respondent that year). He suggests (and this was concurred in by the courts below) that this was wrongful, perhaps on the theory that it was irrelevant to criticize his union role to employers, or on the ground that it was an interference with advantageous relations. He also suggests that it was indicative of malice, in the old sense of that term as defined before *New York Times Co.* v. *Sullivan.*

Respondent ignores the fact that he was in an obligatory speaking position *vis-a-vis* the public. Radio is a public utility and monopoly. The government of the people of which Petitioners were a part created this monopoly, meaning that on weekdays from 5:05 to 6 P.M. WCBS in the New York area could force Respondent's words on them, if they wanted to hear anyone at 880 on the dial.

No one, on the other hand, was compelled to go to Toledo, Ohio, to buy a ticket and thereby become a private licensee to witness Jack Dempsey's 1919 "loaded gloves" fight with Jess Willard, see *Dempsey* v. *Time, Inc.,* 43 Misc. 2d 754, 252 N. Y. S. 2d 186, (Sup. Ct., N. Y. Co., Spec. & Trial Term) *aff'd without opinion,* 22 App Div. 2d 854, (1st Dep't 1964) (Brief, p. 15). Nor was one compelled to go to a private ball park to watch Orlando Cepeda of the San Francisco Giants. See *Cowles Magazine & Broadcasting, Inc.* v. *Cepeda,* 328 F. 2d 869 (9th Cir.), *cert. denied,* 379 U. S. 844, 85 S. Ct. 51, 13 L. Ed. 2d 50 (1964) (Brief, p. 14). Neither man by his activity, which people voluntarily paid to see, was in a position to influence the conduct (and rights) of other people.

One could not, however, avoid the Respondent even by not buying Libby's tomato juice, Pall Mall cigarettes of the American Tobacco Company, or Rheingold beer (Amended Complaint, pars. 16 and 23; Petition, Appendix B, pp. 111, 115). He was there, and Beethoven was not, and a patent-medicine show was not, and no other station was allowed nearby on the dial. He was there because Federal governmental power permitted WCBS to force him onto the public

airwaves. If his salary was high, it is because government permitted WCBS' monopoly to bring in vast revenues.

What is the remedy of Petitioners? Are they restricted to complaining to the FCC if they dislike such a compulsory entertainer, or to voting for a new congressman or president if they do not like the use made of their airwaves? Thus far in this case, the courts below imply that is about all they can do.

Petitioners contend that this is error, that the First Amendment gives them the right to complain to anyone who will listen about any aspect of the public's airwaves and their users. They urge that the First Amendment recognizes no degrees of relevance and they rightfully might for any reason talk or write to Respondent's present and prospective employers, advertisers or broadcasters about anything they wished concerning who should be forced on them over those airwaves.

Petitioners concede that Respondent had a First Amendment right to be controversial about them in his union activities. They claim, however, that they too have a First Amendment right to complain to Respondent's broadcasters about his union activities against them. A broadcaster could laugh off their complaints or could ask Respondent to tone down his activities.

If he went further and fired Respondent, as claimed in this case (and Petitioners have consistently denied that they were the cause of Respondent's losing his job a year and a half after the *News Supplement* was issued) the fault is not Petitioners'. It is the Federal government which as early as 1912, limited the number of stations and their hours (in some places there may only be one receivable channel), giving some power (signal strength) only to be heard near and some afar, and which has made it possible for some licensees like WCBS to amass riches and pay high salaries to persons like Respondent.

If this government-imposed and fostered scarcity makes it desirable for licensees to employ only non-controversial

entertainers, lest they lose some of their riches by losing part of their forced audience, this is Government's policy. If there were twice as many stations, Respondent's job might have been ten times as secure but paid a third as much, again as a result of government policy. Petitioners should not be silenced to protect the job tightrope government has imposed on broadcasting entertainers.

Petitioners therefore contend that the First Amendment vindicated their right to criticize Respondent to employers, or to any others of the *News Supplement* recipients (Brief, p. 6) who stood to benefit from the governmentally-imposed monopol. in broadcasting, or to any other member of the public.

III.

The New York courts' misapplication of tests of "actual malice" (old style) to Petitioners' intrinsically political utterances instead of this Court's test of "actual malice" (new style) as laid down in *New York Times Co.* v. *Sullivan* (actual knowledge of falsity or utter recklessness) violates Petitioners' rights of freedom of speech and the press.

Respondent's minor theme throughout his Brief is that Petitioners' conduct reeked of malice and therefore the *New York Times Co.* v. *Sullivan* privilege which they claim should be defeated.

Petitioners contend that the courts below did not apply the test of "actual malice" required by *New York Times Co.* v. *Sullivan.* There was no showing that Petitioners met the two key standards that case calls for: knowledge of falsity or utter recklessness. Instead, there was general talk in varying degrees of other things Petitioners might have done to other people (e.g., "blacklisting"); talk of other persons not parties to the case who mostly did not even discuss the case (e.g., Kim Hunter); the implication that Petitioner Hartnett, by profession a research consultant, had a financial motive in opposing Respondent, who

opposed him; talk of how public Petitioners had made their utterances (i.e. to employers); and even argument that the UN dinner (Petition, pp. 15-16, 49-51, 68-72) was misrepresented in the *News Supplement* (Petition, p. 63).

Pejoratives and Prejudice—give a dog a bad name

Throughout this case, the complaint, the press release of the same date (Exh. J, in evidence, R. 1199), Respondent's book and other statements on this case, press comment, book reviews, commentators, the courts below, all have emphasized the word "malice." One might call this the "big characterization" technique. As pointed out in the petition, the feeling in liberal New York about Petitioners' anti-communist views and activities in connection with broadcasting (characterized as "blacklisting") was as negative as the *New York Times'* views on segregation in white Alabama.

Petitioners contend that the characterizations so often used in this case ("extreme malice," "private character assassination," "corrupt interests," "travesty," "most malicious and unjustified attack heretofore reported," "attempt to subvert," "intimidated," "vigilantes," "tyranny," "blood money," "succession of lies," "smear," "temerity," "effrontery," "ludicrous analogy," "excesses," "sheer coercion," "blacklist," "perversion," "subversion," "vicious," "hypocritically," "racketeering"—all terms used in the Brief) may well have influenced the courts below and have strong powers of suggestion but add nothing to an analysis of this case. Respondent's publisher has even taken to using such terms in advertising "Fear on Trial," Respondent's book on this case. See large ad, "the discovery of an American hero," with testimonials, New York Times, Jan. 26, 1965, p. 35. cols. 6-8.

"Deliberate" — a word adding nothing to the case

An additional theme of Respondent is that Petitioners' acts were not reckless but were "deliberate," This, however, is a characteristic of the law of libel itself. It adds

nothing to say a libellor was deliberate. All alleged libellors are deemed to be deliberate in their actions. They deliberately publish the utterances in question. Even in *New York Times Co.* v. *Sullivan,* the *Times* deliberately printed the advertisement with its accusations of evil, though believing them true. But for that decision there would have been a "deliberate" group libel of "they," even if not of Commissioner Sullivan. It begs the question, however, for Respondent to say that "deliberate" adds anything to this case.

"Falsity" — a misleading word

On the other hand, Respondent's use of the word "falsity" (in referring to the seven "affiliations with Communist and Communist-front activities" charged to Respondent in the *News Supplement,* Brief, p. 7) is quite misleading. "Falsity" was never proven, merely being presumed from failure to prove the truth that Respondent did everything the seven documents (Petition, Appendix B, pp. 65-76; discussed, pp. 9-12, 34-38, 49-53) said he did or was to do. The word is harmful, even being used uncritically (in its related form "false") in the precis of this case in 33 U. S. L. WEEK 3248, January 19, 1965.

Moreover, the true test under *New York Times Co.* v. *Sullivan* is not even failure to prove truth, but instead knowledge of falsity or utter recklessness.

"Blacklisting" — trial of the issue of whether Columbus discovered America

Half the trial, the entire motivation of this case, and almost all press comment had nothing to do with libel. (See Petition, pp. 40-44.) As Respondent pointed out in his press release, multigraphed in his counsel's office and distributed the day the complaint was served (Exh. J, in evidence R. 1199), he was after "blacklisting." So said counsel (opening statement R. b. 113-4).

Despite efforts to have "blacklisting" defined, always rebuffed by the trial judge, testimony as to undefined

"blacklisting" ran to some 4,000 pages, supposedly to give a background of Petitioners' "malice." Most of the testimony was a general outcry against spectres under the bed, by persons in an industry noted for the scarcity of jobs and receptive to any excuse for not getting them. Tears ran when David Susskind told the story of the unidentified little girl who was "blacklisted" because her parents were supposed to be controversial (R. 419). Indignation was felt when Garry Moore read a newspaper article reciting the plight of the unidentified acrobat "blacklisted," though he never said anything on stage (R. 773). Petitioners were linked to neither. Laughter, however, accompanied the revelation that Petitioner Hartnett had once given an opinion on "Santa Claus" (R. 6497-6499), though a well-known model used that name (R. 6498).

Had the question of whether Columbus discovered America been made the issue, it could not have been less relevant to a fair trial of libel. Had the issue of whether Eichmann was guilty been injected, it could not have been more damaging (and in conflict with this Court's test of what constitutes "actual malice"). That the toy sailboats of "tiny malice" (all old style) floated on top of this tidal wave of irrelevance could not be distinguished by the jury is conclusively demonstrated by the $3,500,000 verdict. Even the trial judge, who had opened the floodgates, let himself be carried away by it when he confirmed the verdict.

"Extreme malice" (Brief, pp. 6-12) as not even tiny malice by *New York Times Co.* v. *Sullivan* standards

Aside from the pejoratives, misleading words adding nothing to the cause of action ("falsity" and "deliberate"), the irrelevant issue ("blacklisting"), and the question of whether Petitioners had a proper interest in communicating with the whole industry including employers, Respondent has not shown that Petitioners had knowledge of falsity or were guilty of utter recklessness.

In discussing the *News Supplement* (Brief, pp. 6-9), Respondent contends that it was "demonstrated" that it

was a "succession of lies", ignoring the *News Supplement's* documentary base and other matters known to Petitioners, as well as Respondent's admitted attendance at functions of three of the seven organizations with which he was linked by the *News Supplement* (Petition, pp. 9-12, 34-36, 52-53, Appendix B, pp. 65-76). All Respondent means is that Petitioners did not meet the erroneous test of proving the truth of the seven matters pointed out by the *News Supplement*, a test in conflict with that imposed by *New York Times Co.* v. *Sullivan*.

As for the UN Dinner "falsification" (Brief, p. 8) (discussed more fully in Petition, pp. 49-51) and the "omission" of "all of the many favorable and highly patriotic attributes of respondent's career" (Brief, p. 9), since when have those in political warfare been required to include good things with the bad things they know about their enemies? It would have nullified the privilege in *New York Times* v. *Sullivan*, if the *Times* had to include in its ad Commissioner Sullivan's "war-time enlistment despite his blindness in one eye . . ., his numerous professional, patriotic and charitable activities, awards and honors . . ." (Brief, p. 9).

To quibble about whether the Independent Citizens Committee, sponsor of the UN Dinner, "had never been 'designated a Communist front' " (Brief, p. 8) in the face of three references to it, including one that it was "cited as a Communist front," in the House Committee on Un-American Activities' *Guide* (Petition, pp. 11, 50), seems profitless.

Nor do Respondent's charges that Petitioner Hartnett had no right to communicate with the Chief Clerk of the House Committee (Brief, p. 10) or the New York City Police Department (Brief, p. 11), or with his clients, Young & Rubicam (Brief, p. 10) and the Kudner Agency (Brief, p. 11), all of which events came before publication of the *News Supplement* and are otherwise privileged, prove "extreme malice." Respondent was merely trying to bring other claims in by the back door as "malice," which were otherwise barred.

Respondent even argues that bringing up the seven events of 1946-9 as late as 1956, and then bringing them up only because he was a "successful candidate for office" (others with "much more substantial records" being ignored), constitutes "malice" (Brief, pp. 9-10). When people are arguing over their governors, is an intrinsically political question of suitability subject to a statute of limitations, or are there minimum limits to derelictions which can be discussed? Consider the case of Representative Samuel Stratton, a liberal Democrat from upstate New York, thought to be a strong contender for higher office. Should some officials of New York's Liberal Party be thought "malicious", when, year after year, they object to him because in 1936, at age 16, after a vacation in Germany, he wrote an article favorable to some Nazi policies for his high school paper?

The "admissions" and "acknowledgments" sprinkled through the "extreme malice" section of the Brief (pp. 7-11), when individually examined together with related testimony on the other side stand for nothing except opinion at the trial as to beliefs of six years earlier, much less "knowledge of falsity," and were generally in answer to hypothetical questions.

Respondent alleges malice in Petitioner Aware's then-president, Godfrey P. Schmidt, stating over television on June 24, 1956, after the law suit began, that the *News Supplement* was true (Brief, p. 11). Aside from the fact that his statement negates "knowledge of falsity," it is an expression of his opinion as to the *News Supplement's* truth:

> "I say that any intelligent person who is willing to put in the research and industry, can do that thing and do it competently, and we did it competently in the case of Mr. Faulk, and what we stated about Mr. Faulk was the truth and nothing but the truth" (Ex. 98, in evidence p. 5000).

Moreover, the same Mr. Schmidt was counsel who prepared the verified answers (Brief, p. 12). As to Respon-

dent's having "admitted" such truth (Brief, p. 12), see the Petition (p. 52) for the efforts of Petitioners to permit proper hearsay evidence bearing on Petitioners' reasonable belief in truth of admissions by Respondent in 1955 to Don Appell, investigator for the House Committee on Un-American Activities, of involvement with Communist fronts, and further admissions to Henry Jaffe and Bud Collyer that the items in the *News Supplement* were true, but "so what". See also the seven documents themselves (Petition, Appendix A, pp. 65-76).

Finally, Hartnett's statement to Mr. Pat Winkler of station WOR concerning possible employment of Respondent by WOR (Brief, p. 12) was in answer to Winkler's question and in itself privileged. A reading of the record, however (R. 5758-5762), indicates that the quoted words used in the Brief were only an expression of opinion at the trial half a decade later. What Hartnett actually said to Winkler was, after mentioning the law suit, a reiteration of his belief: "I personally believe that the specifications in the Aware bulletin were correct" (R. 5760).

They did not lie

To sum up this section of the Reply, Petitioners did not lie, nor did their actions amount to lying (which they take as the layman's translation of the *New York Times Co.* v. *Sullivan* rule of "actual malice": knowledge of falsity or utter recklessness; or of the reiterated rule in *Garrison* v. *La.*, 379 U. S. (1964): "Only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.")

IV.

The question of "whether the entire common law right of action for libel should be abolished" is clearly relevant though the Court need not go so far in view of the political and public nature of this case.

Respondent contends that the only real "question presented" by petitioners is "whether the entire common

law right of action for libel should be abolished" (Brief, p. 3). Petitioners do not urge the Court to go so far, since this is not a private but a public, political case within *New York Times Co.* v. *Sullivan.*

Petitioners concede the *Sullivan* case is a *deus ex machina* to Petitioners, coming like the Eighth Cavalry to rescue the remnants of Custer's force after Little Big Horn. It is, however, like turning on the light for the first time in a room, the room being that of political free speech, and Petitioners contend that the Court of Appeals of New York erred in not applying it.

The Court of Appeals in this case is not alone in such non-application. Lower New York courts including the Appellate Division have been most reluctant to apply it at all in the reported cases which have arisen since the decision in *Sullivan.* E.g. *Dempsey* v. *Time, Inc.,* 43 Misc. 2d 754, 252 N. Y. S. 2d 186 (Sup. Ct. Trial Term N. Y. Co.), *aff'd without opinion* 22 App. Div. 2d 854 (1st Dep't 1964) (Brief, p. 15): "in [this Court's] opinion the New York Times case was limited to its specific facts, to wit, criticism of the official conduct of public officials, and did not adopt 'an absolutist view of the rights safeguarded by the First Amendment' "; *Spahn* v. *Julian Messner, Inc.,* 43 Misc. 2d 219, 250 N. Y. S. 2d 529 (Sup. Ct., Spec. & Trial Term, N. Y. Co. 1964) (injunction and damages granted against biographer in right of privacy case by Warren Spahn, the pitcher); *Harper* v. *National Review, Inc.,* N. Y. L. J. Dec. 23, 1964, p. 11, col. 2 (Sup. Ct., Spec. Term, N. Y. Co.); 33 U. S. L. WEEK 2341 (dismissal of complaint denied where facts might show that action [by plaintiff, a "world famous jurist and educator, having held academic, government and other posts", against political opinion journal] involved "private parties" and malice). But see *Schneph* v. *N. Y. Times,* Nov. 23, 1964, unreported (Sup. Ct., Bronx Co., Korn, J.) (Claim by principal attorney in city corporation counsel's office dismissed).

On the other hand the Federal courts have been willing to apply *Sullivan.* E.g. *Pauling* v. *News Syndicate Co., Inc.,*

335 F.2d 659 (2d Cir. 1964), *cert. denied* 33 U. S. L. WEEK 3245 (U. S. Jan. 18, 1965) (Judge Friendly of that Court has even criticized state-court foot-dragging when Federal questions are raised, urging "closer approach of state law to Federal law" in constitutional rights cases. New York Times, Jan. 31, 1965, p. 43, col. 3). Cf. *Smoot* v. *League of Women Voters of Grand Traverse (Mich.)* 36 F. R. D. 4 (W. D. Mich); *rev'd*, N. Y. Times, Jan. 17, 1965, § 4, p. 7 Col. 3 (6th Cir. 1964) (TV and radio political commentator dismissed suit against voter's league after district judge indicated *Sullivan* case was controlling) (see Petition, p. 59.)

So have some other state courts: *Goldmark* v. *Canwell*, New York Times, Dec. 10, 1964, p. 7, Col. 1 (Super. Ct. Seattle, Wash. 1964) (retrial ordered in case of ex-state legislator who won damages for "being linked to Communism" during primary which he lost); *Pearson* v. *Fairbanks Pub. Co., Inc.* (Sup. Ct., Alaska, 4th Jud. Dist. Nov. 23, 1964) (political columnist denied damages); *Clark* v. *Allen*, 415 Pa. 484, 204 A. 2d 42 (1964) (Senator seeking re-election denied damages) (see Petition, pp. 23-25).

What is the scope of the Court's *Sullivan* decision? The New York courts would seem to treat it as a mere shifting of a few presumptions where an old-line government official is involved. One commentator suggested it was merely a case to help out a national newspaper threatened with ruin. Note, Supreme Court, 1963 Term, 78 HARV. L. REV. 143, 204 (1964).

Petitioners suggest it is something more. Petitioners contend the Court was writing on a clean slate for political cases, and the old law of libel, spawned out of religion ("thou shalt not bear false witness against thy neighbor"), sedition laws, pre-police force public policy (relieve pressures for duelling), encrusted with the presumptions of centuries, should be considered mainly of historic interest in such cases. Petitioners urge that the Court draw the line on the basis of politics as it is today, balancing the interests in free speech and private reputation in terms of the pro-

tection each needs in the days of mass communication and a vastly increased public sector.

Petitioners contend that this goes as well for damages. The deterrent and penal-fine theory of punitive damages on its face is at war with the First Amendment in political speech cases. (See the Trial Court's view that punitive damages represent a "warning to others", 35 Misc. 2d 302, 311; Petition, Appendix B, p. 101, concurred in by the Appellate Division, 19 App. Div. 2d 464, 471; Petition, Appendix B, p. 89; see charge, Petition, p. 133). The same applies to compensatory damages, where the failure to limit the test of malice to knowledge of falsity or utter recklessness, had the fire-storm effect of a compensatory damage verdict alone of $1,000,000., with the reduction of all damages to $550,000. merely acting as a damper. It is mass prior-censorship. Respondent was permitted to run up the score.

Petitioners submit that the First Amendment should be used like a scythe on damages, to make speech on political matters no more costly in New York (damages in this case $550,000.), than in Mississippi (See *Henry* v. *Pearson*, 158 So. 2d 695 (Miss. 1963), *pet'n for cert. filed*, 33 U.S.L. WEEK 3017 (U.S. May 15, 1964) (No. 90), where $25,000. was awarded to county attorney for damages including loss of part of private law practice (See Petition, p. 25); or New Hampshire (See *Rosenblatt* v. *Baer*, 203 A. 2d 773 (N.H. 1964), *pet'n for cert. filed*, 33 U.S.L.WEEK 3235 (U.S. Dec. 23, 1964) (No. 780) where supervisor of county recreational area was awarded $30,500. for loss of income over three years).

Petitioners suggest that the true test of the *Sullivan* privilege should be whether the person concerning whom utterances are made enjoys obligatory powers at the expense of the public. If he claims damage from utterances he should not be entitled to claim damages for benefits he enjoys at the grace of the same public. (Should a union officer or radio entertainer who benefits from the government giving his station a monopoly of part of the public airwaves, receive more in compensation on an annualized

basis than the salary of any government official except the president himself, even if he is in fact damaged?)

If the Petitioners are correct in claiming that *Sullivan* was writing on a fresh slate, they also contend that this case should be heard, when the Court draws more lines on the slate. Petitioners did all they did without hope of financial gain. They thought they were acting in the public interest. (Far from "amassing" $100,000., as Respondent claimed (Brief, p. 5) Hartnett received nothing from his work for Aware; his average annual consultant income after expenses was $11,000.; he had lost all income by 1958 as a result of this lawsuit; and is now appearing as a poor person. Aware was a non-profit membership corporation a quarter of whose 300 members were AFTRA members. The late Mr. Johnson was devoting his retirement years to his ideals.)

Should respondent be correct, that he "is the victim of the most malicious and unjustified attack heretofore reported" (Brief, p. 3); should this be the hard-core political libel of all history, it should nevertheless be heard. Petitioners submit that the public and they should know for the future where the First Amendment stops. The First Amendment's limits should not be decided only on Lawrence Welk cases. It takes Lenny Bruce cases too.

CONCLUSION

For the reasons set forth herein and in the Petition, Petitioners respectfully urge that a Writ of Certioriari should be granted.

Respectfully submitted

Dated: February 9, 1965

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